



Law Department

Louisville Gas and Electric Company
220 West Main Street
P.O. Box 32010
Louisville, Kentucky 40232
502-627-3450
502-627-3367 FAX

February 1, 2001

Thomas Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Blvd.
P.O. Box 615
Frankfort, KY 40602

RECEIVED
FEB 01 2001
PUBLIC SERVICE
COMMISSION

**Re: Petitions of Louisville Gas and Electric Company and Kentucky Utilities Company
for Confidential Treatment of Certain Information Contained in Coal Supply
Contracts; Case Nos. 2000-453 and 2000-454 (consolidated)**

Dear Mr. Dorman:

Enclosed you will find for filing an original and ten (10) copies of the Brief of Louisville Gas and Electric Company and Kentucky utilities Company in the consolidated cases referenced above. I have also enclosed an additional copy that I request be file stamped and returned in the enclosed self-addressed envelope.

Please contact me if you have any questions about this filing. A copy of this letter and the enclosed Brief have been mailed this date to the Hon. Elizabeth Blackford, Office of the Attorney General.

Sincerely yours,

Douglas M. Brooks
Senior Counsel Specialist, Regulatory
(502) 627-2557

Enclosures

cc: Hon. Elizabeth Blackford

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED
FEB 01 2001
PUBLIC SERVICE
COMMISSION

In the Matter of:

PETITION OF LOUISVILLE GAS AND ELECTRIC)	
COMPANY AND KENTUCKY UTILITIES)	
COMPANY FOR CONFIDENTIAL TREATMENT)	CASE NO. 2000-453
OF CERTAIN INFORMATION CONTAINED IN)	
COAL SUPPLY AND TRANSPORTATION)	
CONTRACTS)	

In the Matter of:

PETITION OF LOUISVILLE GAS AND ELECTRIC)	
COMPANY AND KENTUCKY UTILITIES)	
COMPANY FOR CONFIDENTIAL TREATMENT)	CASE NO. 2000-454
OF CERTAIN INFORMATION CONTAINED IN)	
COAL SUPPLY AND TRANSPORTATION)	
CONTRACTS)	

**BRIEF OF LOUISVILLE GAS AND ELECTRIC COMPANY
AND KENTUCKY UTILITIES COMPANY**

FEBRUARY 1, 2001

I. INTRODUCTION

Kentucky Utilities Company (“KU”) and Louisville Gas and Electric Company (“LG&E”) (collectively, the “Companies”), request that the Commission recognize the commercially sensitive nature of the price, terms and other conditions of their coal and coal transportation contracts by affording the information protection from public disclosure under the Open Records Act and 807 KAR 5:001, Section 7.

The specific information for which the Companies seek protection consists of prices, quantities and terms of coal supply agreements, and rates and other terms of coal transportation agreements. A detailed listing of the specific contractual terms and conditions covered by the Petitions is given in the Companies’ Response to Information Requested During the December 6, 2000 Hearing, Item 2 (attached hereto as Attachment 1), and is specifically shown in the redacted versions of the contracts that were filed with the Petitions.

The Companies have presented testimony in this proceeding that more than meets the burden imposed by KRS 61.878(1)(c)1 to show that this information is confidential and proprietary, and that disclosure would give competitors in several markets in which the Companies compete an unfair advantage. In summary, disclosure increases the prices the Companies pay for coal and transportation, which results in lower margins in the off-system sales market and less attractive rates for prospective retail customers. The Companies have shown that this information is routinely used by coal and transportation suppliers to charge higher prices to the Companies and to the detriment of their customers, which is estimated to cost the Companies and their customers as much as \$10 million annually through the application of the Fuel Adjustment Clause mechanism. In so doing the Companies have squarely answered

the Commission's criticisms of the evidence presented in Case No. 97-197, which was the proceeding in which KU last requested confidential protection for its contracts.

In the same spirit in which the Commission has recognized the need to protect from public disclosure the commercially sensitive information contained in LG&E's gas supply contracts and the Companies' coal bid tabulation sheets routinely provided in Fuel Adjustment clause proceedings, the Commission should grant the Companies' Petitions and shield the confidential information from public disclosure.

II. PROCEDURAL BACKGROUND

On August 18, 2000 and September 1, 2000, the Companies filed with the Commission new coal supply agreements, amendments to agreements, purchase orders, and revisions to coal transportation rates as required under the Commission's Fuel Adjustment Clause Regulation 807 KAR 5:056. Concurrently with these filings the Companies filed Petitions seeking confidential protection under 807 KAR 5:001, Section 7, for certain specified information contained in the agreements, including prices, quantities, and the terms of the contracts. The Commission's Executive Director, by letter issued September 6, 2000, denied the Petitions, but gave the Companies twenty days in which to respond to his letter. On September 26, 2000, the Companies requested that the Commission reconsider its denial of the Petitions and requested an informal conference with the Commission Staff. The Commission responded by an Order issued October 9, 2000 in which it found that the Companies' Petitions posed significant policy issues that should be explored through an evidentiary hearing, and set a procedural schedule to allow for a full examination of those issues.

The Companies subsequently filed the direct testimony of Robert Hewett, Group Executive – Regulatory Affairs for KU and LG&E, and James Heller, of PA Consulting Group, which addressed the issues identified in the Executive Director’s letter of September 6th. Requests for information were propounded by the Commission on November 9, 2000, and the Companies filed their responses on November 20, 2000. On December 1, 2000, the Attorney General, at the invitation of the Commission, requested intervenor status, which was granted on December 5, 2000. The hearing was conducted on December 6, 2000, and the Companies filed responses to certain requests for information made during the hearing on December 22, 2000. A briefing schedule was set at the conclusion of the hearing.

III. ARGUMENT

A. The Requirements of the Open Records Act

KRS 61.878 (1)(c)1 exempts from public disclosure certain commercial information filed with the Commission that is generally recognized as confidential or proprietary. To qualify for this exemption and maintain the confidentiality of the information, a party must establish that disclosure of the commercial information would permit an unfair advantage to competitors of the party seeking confidentiality.

The Kentucky Supreme Court has interpreted KRS 61.878 (1)(c)1 in two reported cases, Marina Management Services v. Commonwealth of Kentucky, 906 S.W.2d 318 (Ky., 1995) and Southeastern United Medigroup, Inc. v. Hon. John J. Hughes, 952 S.W.2d 195 (Ky., 1997). In Marina the Court held that audited financial statements of a privately-owned state licensee are exempt from disclosure under the Open Records Act. 906 S.W.2d at 319. The records in question included information on asset values, notes payable, rental amounts received, profit

margins, net earnings and capital income. The Court held that disclosure of the records would unfairly advantage competing operators, most obviously through the ability to ascertain the economic status of the licensee without having to run the hurdles normally associated with acquiring such information about privately owned corporations. Id. The Court rejected the arguments of the dissenting opinion that the licensee had not identified any irreparable or immediate injury that it would suffer should the reports be disclosed. Id. at 320.

In Southeastern United the Court upheld a hearing officer's ruling that proprietary financial information filed by an insurance company in the course of a rate hearing should be protected from disclosure under KRS 61.878(1)(c)1. The Court ruled that a statutory requirement for a "public" hearing on a rate increase did not defeat the Open Records Act's protection of information filed by a regulated entity from the damage that would be caused by its public disclosure. 952 S.W.2d at 198-9. The Court described a two-step analysis of confidentiality claims when it stated that "if it is established that a document is confidential or proprietary, and that disclosure to competitors would give them substantially more than a trivial unfair advantage, the document should be protected from disclosure to those who are not parties to the proceeding." Id. at 199. Importantly, the Court did not rule that the petitioning party provide concrete examples of where it has been harmed by the release of the confidential information in the past, nor did it question the holding in Marina that the party seeking relief need not show an irreparable or immediate injury that would be suffered should the reports be disclosed.

B. The Information in Question is Confidential and Proprietary

It is thus well established that the Companies are entitled to the protection sought in their petitions if they have shown that (1) the information in question is confidential or proprietary, and (2) that access to the information will give the Companies' competitors an unfair advantage. The Supreme Court has not imposed a requirement that the party seeking protection from disclosure show that harm has already occurred from a prior release of the subject information, or that irreparable injury is imminent.

As for the first requirement, neither Marina nor Southeastern United expressly defined the terms "confidential" or "proprietary" within the context of the Open Records Act. Other Kentucky statutes provide some assistance by defining the same terms in somewhat different contexts. For example, KRS 65.7621, Section (15) defines "Proprietary information" to mean "information held as private property, including customer lists and other related information, technology descriptions, technical information, or trade secrets." KRS 45A.445 (2) defines "Confidential information" to mean "any information which is available to an employee only because of his status as an employee of the local public agency and is not a matter of public knowledge or available to the public on request." Thus it can be argued that confidential or proprietary information is information that its holder does not willingly disclose for commercial reasons and closely limits its dissemination.

Prior Commission orders granting protection from disclosure have discussed what constitutes material that is confidential in a manner consistent with these statutory definitions. In its Order of November 30, 1995 in An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Kentucky Power Company From May 1, 1993 to October 31, 1993, et al., Case Nos. 92-492-B, 92-493-B, and 92-494-B, the Commission

described the confidential material under examination (coal supplier bids and written evaluations of those bids) in the following terms:

. . . (T)he material in question is generally regarded as confidential and privileged. Access to the bids and the utility's evaluations is limited to select employees within the utility's fuel procurement and regulatory affairs departments. (footnote omitted) This information is not routinely disclosed to regulatory agencies and, when disclosed, those agencies have treated it as confidential."

Order at 3-4.

Based upon this finding, the Commission subsequently ruled in Case No. 92-494-C, An Examination by the Public Service Commission of the Application of the Fuel Adjustment Clause of Louisville Gas and Electric Company From November 1, 1993 to April 30, 1994, that coal supply bids and bid tabulation sheets "are generally recognized as confidential and proprietary." Order, December 11, 1995, p.1.

The Companies submit that the sensitive commercial information contained in their coal supply and transportation agreements are confidential and proprietary. Prices, quantities, and the term of a contract are information which the Companies do not disclose externally except in required regulatory filings and to the suppliers themselves, and disseminate only to those employees with a legitimate need to know the information. Petitions, Section 6. Furthermore, as the Companies' witness James Heller testified, this information is avidly sought by competitors of the Companies for use to their advantage in a highly competitive market, and is routinely protected from disclosure in one form or another by most regulatory bodies. Clearly, the information in question is both confidential and proprietary.

C. Disclosure of the Confidential Information Results in Additional Fuel Costs for Retail Customers and Gives the Companies' Competitors an Unfair Advantage

The second requirement to qualify under the exception to the Open Records Act in KRS 61.878 (1)(c)1 is that access to the confidential and proprietary information will give the Companies' competitors an unfair advantage. The testimony of Companies witnesses Hewett and Heller address this requirement in detail and establish that disclosure of the confidential information has given the Companies' competitors in both the wholesale energy market and in the market for new and expanding retail load an unfair competitive advantage.

1. Testimony of Robert Hewett

The Companies presented the direct testimony of Robert Hewett, Group Executive – Regulatory Affairs. Mr. Hewett is well known to this Commission, having been employed by Kentucky Utilities and the Companies since 1966 and having testified before this Commission on numerous occasions since 1982. Mr. Hewett's testimony described how the Commission's Fuel Adjustment Clause ("FAC") regulation, 807 KAR 5:056, requires the Companies to provide the Commission with copies of their fuel procurement and associated transportation agreements. He also described the interplay of the FAC regulation with the Open Records Act, in which documents filed with the Commission under the FAC regulation come under the provisions of the Open Records Act, which provides for confidential treatment of information filed with the Commission that meets certain specific requirements of the Act. Hewett Direct, p. 3-4.

Mr. Hewett then discussed the harm that continued public disclosure of the confidential information will cause the Companies. He pointed out that the Companies' other witness, Mr. Heller, demonstrates how public disclosure of this information allows coal suppliers to maximize the price the Companies pay for coal. This inevitably leads to additional fuel costs for retail customers and lost margins and lower revenues for the Companies in the wholesale power

markets from off-system sales. Mr. Hewett stated that under the Earnings Sharing Mechanism approved by the Commission for KU and LG&E, reduced margins will necessarily lower the actual returns earned by the Companies and thus reduce the benefits that the Companies' retail customers would otherwise receive under the ESM. Id., p.4.

Mr. Hewett also testified that the Companies have worked hard to support the economic development efforts of state government to bring new and expanded employment into the Commonwealth. The level of the Companies' electric rates plays a role in enticing new customers to locate in their service territories and current load to expand. If the rates are higher than they otherwise would be because of the public disclosure of the Companies' coal supply and transportation agreements (as Mr. Heller has shown, see p. 16, infra), then their competitive position with regard to gaining new or expanded retail load has been damaged. Id.

Mr. Hewett next discussed prior Commission Orders in cases in which requests for confidential protection were granted, and showed how the Commission's findings in those cases support the relief requested by the Companies in this proceeding. (These cases are further discussed at pp. 21-23, infra.) He first discussed East Kentucky Power Co.'s ("EKPC") request for approval of a long-term power contract with Kentucky Pioneer Energy, LLC in Case No. 2000-079. In that case EKPC requested confidential protection for pricing information in its contract with Kentucky Pioneer, which was granted by the Commission. Mr. Hewett pointed out that the Commission's action implicitly recognized the competitive nature of the wholesale power markets and how disclosure of a utility company's commercially sensitive data can disadvantage it in that market. Id., p. 5.

He then discussed the Commission's treatment of coal bid tabulation data submitted by KU, LG&E and Kentucky Power Company in response to data requests propounded by the

Commission in prior fuel adjustment clause review proceedings. For example, in Case Nos. 92-492-B, 92-493-B, and 92-494-B, the Commission found that the Open Records act exempted from public disclosure both the coal bids an electric utility receives and its written evaluation of those bids. Mr. Hewett testified that the Commission's Order in those cases reflected the following findings of fact:

- Given the nature of the coal market, disclosure of coal supplier bids and a utility's written evaluations of those bids will likely increase utility fuel costs.
- Only a coal supplier's uncertainty about its competitors' prices and its fear of losing a contract because of excessive bids limits its bid price.
- Coal suppliers routinely play the coal solicitation process to their advantage in an effort to obtain the highest price for their coal.
- Armed with information about its competitors' costs, a coal supplier can increase its offered price to maximize its profit without fear of losing a contract.
- As the disclosure of the bidding information and bid evaluation methodology will lead to higher fuel prices and thus higher electric rates, it will injure the utilities' ability to compete in the retail and wholesale electric markets.

Id., p. 5. Mr. Hewett stated that the Commission's conclusions regarding the coal bid tabulation data support the granting of the relief sought in these cases. Id., p. 5-6.

He also reviewed the consistent treatment the Commission has given to LG&E's requests for protection of information contained in its gas supply and transportation contracts, as well as in its quarterly filings of gas supply data pursuant to its Gas Cost Supply tariff. Pointing to the Commission's ruling in Case No. 97-022, he testified that the findings made by the Commission in that case are analogous to the Companies' claims in this proceeding, particularly that

disclosure of the gas supply contracts would impair LG&E's ability to effectively negotiate favorable terms and conditions for its gas supply. This, the Commission stated, would result in LG&E and its customers paying higher prices for gas. He noted that these findings are very similar to those made by the Commission regarding coal supply bids and bid evaluations. Id., p. 6-7.

Mr. Hewett recognized that the Commission has defined in Orders issued in prior coal contract cases the areas where the Companies' testimony did not support a finding of confidential protection. He stated that in order to directly address these matters, the Company's testimony in this proceeding provides a more comprehensive review of the facts and issues that support the Companies' Petitions. He also stated that the Commission must recognize that the competitiveness of the wholesale power market has increased on a yearly basis since the passage of the Energy Policy Act in 1992. In his opinion, the facts supporting the conclusion that disclosure of this information substantially disadvantages the Companies in that market have become stronger as the years have passed, thereby supporting the rationale for why the Commission should take a new look at the issues raised by fuel contract disclosure. Id., p. 7.

Mr. Hewett noted that granting the Companies the relief they seek would not interfere with the orderly handling of fuel adjustment clause reviews. The Commission's regulations and past practices have enabled regulated utility companies to protect commercially sensitive information while enabling the Commission and intervenors to review all relevant data, and the granting of the Companies' Petition in these cases should produce a similar result. He stated that the Companies have in the past entered into protective agreements with the Attorney General and other intervenors that permits them to have access to protected information, and such a procedure has proved to be both fair and efficient. Id., p. 7-8.

2. Testimony of James Heller

The Companies next presented the direct testimony of James Heller, a member of the Management Group of PA Consulting Group, an international consulting firm. Mr. Heller has over twenty years professional experience in coal and energy markets, and has developed and published trade publications centered on the coal, coal transportation, and railroad industries. He also has advised participants in those markets, including coal producers, other consultants, electric utilities, other coal purchasers, and transportation companies. In the course of providing professional consulting services and preparing expert testimony in legal and regulatory proceedings, he has procured copies of coal contracts from this Commission and provided information and intelligence from those contracts to his paying clients. Heller Direct, p. 1-2; Transcript of Hearing, December 6, 2000 (“Tr.”), p. 101-2.

Mr. Heller testified that the Companies’ competitors use the information that the Commission makes available to improve their competitive position relative to KU and LG&E. He also testified that other states have increasingly restricted access to detailed fuels data, a development that further increases the Companies’ competitive disadvantage. Heller Direct, p. 4. He noted that changing markets for both electric generating fuels and wholesale electricity have heightened the need to protect confidential fuels information from disclosure. With respect to fuel, Heller testified that while information about competitors was always of interest to other electric generators, with the advance of deregulation the value of that information has soared because the traders and others can gain an enormous competitive advantage with such information. Id., p. 5; Tr. 102-3.

With respect to wholesale electricity, Heller noted that the Energy Policy Act of 1992, the FERC’s Orders 888 and 889, and the restructuring by individual states of their retail markets

have facilitated the development of a robust market for wholesale power. Heller Direct, p. 6. He noted that US wholesale energy sales rose more than 130 percent from about 1,188 million MWh in 1997 to about 2,752 million MWh in 1999, and 786 companies are now registered with the FERC as power marketers. KU and LG&E's wholesale market competitors in these markets include, for example, TVA, Southern Company, AEP, Entergy, CINergy and Commonwealth Edison. Id. Market participants, who make many sales into the wholesale market without the financial protection of cost-based rates, are exposed to market risks as they lose their regulatory guarantee on recovery of all prudently incurred costs. To hedge these risks, generators, and in fact most market participants, have begun to use advanced financial management techniques to control their exposure to market risks. Information about the markets and market participants, and analysis of that information, are becoming critical ingredients of participants' approaches to maximizing profits and managing this risk. Id.

Heller pointed out that KU's off-system electricity sales increased by 1,160 percent from 1990 to 1999, and off-system sales now account for more than 21 percent of KU's total sales of electric energy (in MWh terms), not including brokered sales. Over the same period, he pointed out, LG&E's off-system sales of energy increased by 163 percent, and off-system sales now account for more than 31 percent of LG&E's total sales of electric energy (in MWh, terms), again, not including brokered sales. Heller concluded that the dramatic increases over this time period, combined with the high percentages of total sales accounted for by off-system sales, illustrates the growing importance of the wholesale electricity market to KU and LG&E. Id., p. 6-7.

Mr. Heller further testified that the terms and conditions of the Companies' fuel and transportation contracts are valuable to KU's and LG&E's fuel suppliers and to wholesale

electric market competitors. Because Kentucky is the only state that requires the public disclosure of this information, the availability of competitive information is not symmetrical. In other words, he said, suppliers and competitors get detailed information on KU and LG&E's fuels contracts, but KU and LG&E do not get equivalent information on their competitors' agreements. This, he concluded, creates an unfair commercial advantage for KU's and LG&E's competitors. Id., at 7.

Mr. Heller testified directly to the competitive harm the Companies suffer by the use of this information by competitors in the wholesale electric market. First, he said, it affords competitors the opportunity to price their wholesale power in such a manner that they are able to sell power that the Companies might otherwise have sold. Id. Second, use of the information allows competitors to increase wholesale electric prices, which increases the price of power purchased by the Companies in the wholesale markets. Id. And, third, use of the information allows competitors to negotiate more favorable coal supply and transportation pricing and contract terms than they would have obtained otherwise, which further improves their competitive position relative to KU and LG&E. When the information is used by KU's and LG&E's coal suppliers and transporters, it results in an increase in the cost of coal purchased by the Companies, directly affecting the Companies' retail customers under the FAC, and further erodes KU's and LG&E's position in the wholesale power markets. Id. p. 7-8.

Mr. Heller's professional experience was brought to bear when he discussed detailed examples of how competitors and fuel and transportation suppliers have used this type of specific information to gain commercial advantages, and, at other times, how the lack of availability of such specific information has resulted in advantages for the utility. He stated that for more than 20 years he had been involved in the development and sale of such information as both a

consultant and publisher, and during that time he was involved in, or aware of, many situations in which this information was used. Id., p. 8. He then presented a sample of those situations.

First, he stated that on numerous occasions he provided market price testimony in arbitration and litigation proceedings stemming from market price reopener provisions in coal supply agreements. As an expert, he sought the highest quality information available to inform his opinions about the level of market prices at any point in time. The Companies' data were invaluable to him on these occasions because of the disclosure of the complete contract. He stated that he has been able to use these data successfully as part of his presentations to obtain lower coal prices under these market price reopeners for clients who compete with KU and LG&E. Id., p.9

Second, he testified that in the negotiation of rail rates with a carrier, a utility attempted to create leverage by shifting its coal purchases to truck. The approach was successful, causing a rail rate reduction of about 30%. However, because the railroad knew the nature of the utility's coal contracts as a result of public disclosure by the utility commission, including duration and minimum volume commitment, the railroad reduced the rail rate only for that portion of the volume which was potentially subject to competition. The captive amounts remained at the higher rate. Id.

In his third example a utility was able to obtain a "most-favored-nations" clause in its rail agreement relative to its power generation competitors. This condition was granted upon the condition of confidentiality since the railroad did not want to offer such terms to other companies. Id. Thus the utility was able to benefit from the fact that its rail agreement would not be made publicly available.

In his fourth example involving the re-negotiation of coal supply and transportation agreements, his client was able to obtain a confidential rebate from one of the railroads that was unknown to the competing railroad. The competing railroad actually lowered its rate more than necessary to meet what it perceived to be the competition. In this case the railroad's lack of accurate market pricing information allowed this to occur. Id.

Finally, he testified that on numerous occasions he has provided coal producers with information on "transportation differentials" which are the different rate levels that apply for specific customers from various supply sources. The producers need this information because it helps them refine their bids to meet the competition. The more accurate this information, the less likely that a producer will underbid, that is, leave money on the table relative to the next lowest supplier. He testified that the quality of information available in Kentucky is the best in the country due to the Commission's disclosure rules. Id., p. 9-10.

He demonstrated how the use of confidential information harms the Companies in the illustration set forth in LG&E/KU Hearing Ex. 1. This Exhibit shows how the knowledge of barge rate differences for different barging points has allowed coal suppliers to increase their coal price from specific origins to offset barge rate differentials and still win contracts with KU. Tr. 99-101. He quantified the impact that disclosure of the barge rate differences had on the ultimate price KU paid for delivered coal under a specific contract as \$600,000 on an annual basis. Response to Commission Staff's First Set of Interrogatories, Item 14. He further estimated that if the same type of circumstances applied to all coal purchases of the Companies, customers could experience as much as \$10 million in additional fuel costs per year through the FAC. Id. A copy of that Response and LG&E/KU Hearing Ex. 1 are included for the Commission's convenience as Attachment 2 to this Brief.

Mr. Heller further described how the public disclosure of this information harms the Companies. The harm flows in large part, he emphasized, from the fact that Kentucky is the only state that requires public disclosure of this information, which places KU and LG&E on an unequal footing relative to their competitors. Because delivered fuel costs account for the vast majority of the Companies' variable costs, it is primarily their fuel costs that determine the cost at which they can generate power. The better the quality of information that competitors have about KU and LG&E's fuels contracts, the easier it is for them to understand KU and LG&E's cost structures and then bid in a manner that allows them to capture wholesale power sales that KU or LG&E might have made, or to increase prices of wholesale power sold to the Companies. Conversely, he testified, they can negotiate fuel supply agreements with suppliers that are designed to match or improve upon the terms that the suppliers have already given KU and LG&E in the disclosed contracts. With fuel costs being the largest component of variable costs, the Commission releases exactly the type of information that competitors most need to target their bids and win business that might otherwise be won by KU and LG&E. It is unfair for KU and LG&E, he stated, to be disadvantaged relative to their power market competitors in offers to sell power. The result is that the profits from these lost sales that potentially could have been split between customers and shareholders under the Earning Sharing Mechanism instead are taken by competitors. Id., p. 10.

KU and LG&E purchase wholesale power when demand exceeds generation capacity, or when competitors offer power at prices that are less than KU and LG&E's generation costs. Mr. Heller testified that when other wholesale power marketers are able to learn about KU and LG&E's fuel and generation costs, they are able to raise their offers to just below KU and LG&E's generation costs. This allows them to make sales at higher prices than they would have

offered absent the quality of information disclosed by the Commission, and increases the prices paid by the Companies. He concluded that because of the complexity of the manner in which the information is used, and the fact that the impacts on KU and LG&E are several steps removed from the actual disclosure of the specific information, the damage is insidious and difficult to measure. Id., p.11.

Mr. Heller also found that fuel suppliers and transporters can use this information to better target their bids to both KU and LG&E since they will know precisely the terms and conditions that competing fuel suppliers have accepted. They can use this information in designing their bids and in negotiating with KU and LG&E. He stated that this is an enormous advantage in negotiations, because the coal suppliers will have high quality information about what KU and LG&E are paying under existing agreements and the terms under which they are buying coal. In the absence of the contracts disclosed by the KPSC, suppliers and transporters would have less perfect information and be much more likely to “leave money on the table” in their negotiation of prices and other contract terms. Id.

Furthermore, he stated, to the extent that suppliers and transporters are successful at increasing their prices for sales to KU and LG&E through the use of this information, KU and LG&E’s fuel prices will be higher, placing them at a further disadvantage with respect to the wholesale electric markets in which they compete. This is particularly important because Kentucky regulation requires that the fuel costs associated with KU and LG&E’s off-system wholesale power sales must be assigned the highest of the fuel costs paid by KU and LG&E. Id.

Heller then stated that to the best of his knowledge, no other state regulatory commission requires that the electric utilities it regulates file for public disclosure their actual coal supply and transportation contract documents. In Florida, state law requires that contracts held by municipal

utilities in the state be made available under certain circumstances, but the Florida Public Service Commission does not collect the contracts from any of the state's utilities. However, investor-owned utilities in Florida, which represent the vast majority of the generation capacity in the state, are not subject to the same legal obligation as are the municipal utilities. Most important, though, if any other state regulatory commissions collect these sensitive contracts, they keep the information confidential and do not disclose it publicly. Id. p. 12-13

His conclusions regarding the unfair advantage which public disclosure gives to the Companies' competitors were set out as follows:

- Competitors of KU and LG&E enjoy an unfair competitive advantage as a result of the KPSC's disclosure of coal and transportation contracts held by KU and LG&E. This disclosure provides the generation companies and power marketers with whom KU and LG&E compete with access to information, which because of its quality and timeliness, improves their decision making capability. In competitive situations, such as the wholesale electric markets in which KU and LG&E operate, these competing firms will have an unfair advantage over KU and LG&E. This information advantage potentially allows them to win business by better understanding and responding to KU and LG&E's fuels strategy, undercutting KU and LG&E's offers, negotiating more effectively with fuels suppliers, and adjusting their prices when offering power to KU and LG&E. Id., p. 14.
- Kentucky is the only state in the country that requires public disclosure of coal supply and transportation contracts for non-affiliate operations. Other states that have historically disclosed similar sensitive information, such as West Virginia and Ohio, have

been changing their requirements, and the disclosure of such information is limited. Id., p. 15.

- Damages from the disclosure of such information are insidious and difficult to measure because the disclosed information is combined with other information in affecting a competitor's strategy. The importance of that particular information may be manifest in a lower fuel price for a competitor achieved through a market price reopener, willingness to offer a form of pricing flexibility unavailable to KU and LG&E or a competing bid targeted just below what their fuel prices allow them to provide. Id.
- To the extent that revenues from off-system wholesale electricity sales are shared between KU and LG&E's shareholders and customers under the Earnings Sharing Mechanism (ESM), as Mr. Hewett described, the harm KU and LG&E face in the wholesale electric markets will affect their customers as well as their shareholders. Id.
- Increasing competition in the electric markets will cause the harm from disclosure of contract terms to increase over time. The use of coal price indices coupled with basis differentials to set coal prices, complex pricing terms that involve emission allowances, coal and replacement power; secret rebates, and proprietary deal structures to manage risk will increase over time. A policy that causes one firm's deals to be open to competitors, while others' are not, will have negative effects on the disclosing party. These include a limited ability to mask strategies when negotiating with fuels suppliers or in offering wholesale power sales. Id., p. 15-16. Mr. Heller estimated that the Companies and their customers could be harmed in this way by as much as \$10 million annually.

D. Prior Commission Orders Regarding Confidentiality Protection

As Mr. Hewett's testimony points out, the Commission has dealt extensively over the years with requests for confidential protection of commercially sensitive information under the Open Records Act and its regulation, 807 KAR 5:001, Section 7. Its experiences have demonstrated that the proper application of the Open Records Act can harmonize the rights under the Act of regulated entities such as the Companies with both the public's right to know and the Commission's obligations under KRS Chapter 278. More specifically, its experience has shown that the Commission has already reached the same conclusion advanced by the Companies in this proceeding, namely, that public disclosure of sensitive price and quantity data for coal or other energy commodities harms the utilities that disclose the data and unfairly advantages their competitors.

A relevant example is found in the Commission's treatment of coal bid tabulation data submitted by KU, LG&E and Kentucky Power Company in response to data requests propounded by the Commission in a number of fuel adjustment clause review proceedings. For example, in Case Nos. 92-492-B, 92-493-B, and 92-494-B, the Commission found that the Open Records Act exempted from public disclosure both the coal bids an electric utility receives and its written evaluation of those bids. Order, November 30, 1995. Mr. Hewett's testimony discussed the findings in this case in more detail. (See, infra at p. 9-10.) Of particular note in this case is that the Commission specifically reversed a finding from a prior Order issued in the case that greater access in the market to pricing information would spur competition and improve the operation of the coal market. The Commission's November 30, 1995 Order found that the evidence in the record suggested that the contrary was true, and that disclosure of coal supplier bids will not produce significant reductions in coal supplier prices or improve the operation of

the market. The Commission noted that several courts and commentators have suggested that disclosure produces a contrary result. Order, p. 4, fn. 3.

Another series of rulings that support the relief sought by the Companies is found in the Commission's consistent granting of LG&E's requests for protection of certain information contained in its gas supply and transportation contracts, as well as in its quarterly filings of gas supply data pursuant to its Gas Cost Supply tariff. For example, the Commission in Case No. 97-022 granted LG&E's request for confidential protection of such terms as price, purchase volumes, flexibility and quantities, points of receipt, and expiration dates and terms in its new gas supply contracts. Order, February 18, 1997. The Commission found that disclosure of the data would reveal to LG&E's suppliers the prices LG&E has agreed to pay for gas, and that suppliers with this knowledge, rather than offering their lowest and best prices, could adjust their prices so that they undercut other supplies or other terms. The Commission also found that disclosure of specific terms would damage LG&E's bargaining ability in future negotiations, which would impair LG&E's ability to effectively negotiate favorable terms and conditions for its gas supply. This, the Commission stated, would result in LG&E and its customers paying higher prices for gas. These findings are very similar to those made by the Commission regarding coal supply bids and bid evaluations, and are directly analogous to the arguments presented by the Companies in this proceeding.

The Companies recognize that the Commission has turned down previous requests brought by electric utilities, including KU, for confidential protection of the terms and conditions of coal and related transportation contracts. In Case No. 97-197, the Commission reviewed a request from KU that confidential protection be afforded to the pricing and rate information contained in a barge transportation contract and a purchase order for coal. After initially denying

the Petition, the Commission granted KU's request for rehearing and subsequently conducted a formal evidentiary hearing. In its Order issued March 18, 1998, the Commission again denied KU's request.

The Commission, after reviewing prior cases dealing with the same issues, stated that an electric utility must produce tangible evidence demonstrating unfair competitive advantage in order to justify an exemption from the public disclosure requirements. This, the Commission held, KU had failed to do. Order, Case No. 97-197, March 18, 1998, p. 6, 7. Specifically, the Commission held that KU provided no evidence that KU had incurred higher fuel costs as a result of public disclosure of fuel contracts, that the fuel costs of Kentucky's electric utilities have increased or that the position of Kentucky's electric utilities as compared to those of other states has declined. Id. It also found that KU had presented no evidence to show that its ability to compete in the wholesale electric market has been adversely affected by public disclosure, or to quantify the loss of any sales or customers in the wholesale market. Id., p. 6-7. It concluded that KU had failed to demonstrate that a competitor's knowledge of KU fuel and transportation contracts will translate into a competitive advantage that will deprive KU of potential sales. Id., p.7.

The Companies submit that the evidence they have presented in this case meets the standards established by the Kentucky Supreme Court in Marina and Southeastern United, and corrects the inadequacies in KU's presentation in Case No. 97-197. The Commission took KU to task in that case for failing to quantify the damage KU claimed resulted from public disclosure. Mr. Heller's testimony in this case conclusively shows that the damage to the Companies' competitive position is inevitable, as it provides concrete examples of how such sensitive information is used by competitors and against the Companies to the detriment of

customers. He estimated that disclosure could damage the Companies and their customers by as much as \$10 million annually. There can be no doubt after reading Mr. Heller's testimony that information which the Companies' competitors and suppliers pay consultants such as Mr. Heller to obtain is valuable and competitively sensitive information that will be used to disadvantage the Companies. The very fact that competitors pay for such information proves that it is valuable to them. Furthermore, Mr. Hewett showed how disclosure hurts the Companies' competitive position with regard to retail markets, in that enticing new load to locate in their service territories or existing load to expand is influenced by the Companies' retail rates. See, Response to Commission Staff's First Set of Interrogatories, Item 4. As public disclosure negatively affects the Companies in the coal market, the increased coal prices that result will have an impact on decisions by prospective and current customers.

Although the Companies have show actual competitive damage, a careful reading of the Supreme Court's opinions discussed above reveals that proof of actual competitive damage is not required in order to obtain protection from public disclosure under 61.878 (1)(c)1. The Court's treatment of the confidential business records of the state's licensee in Marina strongly suggests that the nature of the information for which protection is sought and the potential for competitive harm from competitors should disclosure be allowed is sufficient to qualify for protection.

The records submitted to the Parks Department include information on asset values, notes payable, rental amounts on houseboats, related party transactions, profit margins, net earnings, and capital income. These are records of privately owned marina operators, disclosure of which would unfairly advantage competing operators. The most obvious disadvantage *may* be the ability to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations. Further, the facts on the record indicate that the audit statements were disclosed confidentially to Tourism and the Auditor's office. On these facts alone, the exemption clearly applies.

906 S.W.2d at 319. (emphasis added)

E. The Commission's FAC Regulation Does Not Defeat the Companies' Rights Under the Open Records Act

KRS 61.878 sets forth specific exceptions to the Open Records Act's general requirements that the records of state agencies be open to inspection by the public. The Commission, through its regulations at 807 KAR 5:001, Section 7, has established workable procedures under which regulated utilities and others may seek the protection from disclosure afforded by the Open Records Act for information that they are required to file with the Commission. The Commission has used these procedures to give full effect to the requirements of the Open Records Act, including the exemptions from disclosure found in KRS 61.878. A significant example of this is found in the Commission's Fuel Adjustment Clause regulation, which states at 807 KAR 5:056, Section 1(10) that all documents filed with the Commission pursuant to the regulation shall be open and available for public inspection, "subject to the provisions of" the Open Records Act.

However, in denying past requests for protection from disclosure for sensitive information in coal supply and transportation contracts the Commission has held from time to time that the requirement in its FAC regulation, that all documents filed with the Commission pursuant to the regulation shall be open and available for public inspection, defeats claims to confidential protection under the Open Records Act. See, Order, Case No. 9674, A Petition for Confidentiality of Coal Supply and Coal Transportation Contracts of Kentucky Power Company, December 22, 1986, p. 4-5; Order, Case No. 89-216, In the Matter of Petition for Confidentiality of Kentucky Utilities Company, November 7, 1989, p.2-3. See also, Letter of Executive Director to Douglas M. Brooks, September 6, 2000 re ID Number 2000-323. ("to the extent these contracts utilize fuel adjustment clauses, they are public information by regulation.")

However, the Commission in its Order in In the Matter of Kentucky Utilities Company for Confidential Protection of Certain Information Contained in Barge Transportation and Coal Purchase Contracts, Case No. 97-197, March 18, 1998, acknowledged that the Open Records Act applies to filings required by the FAC regulation, and did not cite the language of 807 KAR 5:056, Section 1(10) as grounds for denial of KU's Petition. Order, p.6. This is the proper interpretation of the Commission's obligations under the Open Records Act. It is undisputed as a matter of law in this Commonwealth that an administrative agency cannot add or detract from a statute by promulgating a policy or regulation. See, GTE v. Revenue Cabinet, 889 S.W.2d 788 (Ky. 1994); Roppel v. Shearer, 321 S.W.2d 36 (Ky. 1959); Portwood v. Falls City Brewing Co., 318 S.W.2d 535 (Ky. 1958); Robertson v. Schein, 305 S.W.2d 528 (Ky. 1947). Thus the Commission's direction in its FAC regulation that all records filed under it are open and available for public inspection must be read and applied in harmony with the provisions of KRS 61.878 that exclude certain types of public records from disclosure. Put another way, the Commission through its FAC regulation cannot impose on the Companies any greater burden than that already required by the Open Records Act or deny them any rights afforded by that statute. The Companies submit that the Commission's regulations already give proper recognition of this principle, both in 807 KAR 5:001, Section 7 (see, subsection (2)(a)1 and (2)(d)), and in the FAC regulation. ("Copies of all documents . . . filed . . . under this regulation shall be open . . . pursuant to the provisions of KRS 61.870 to 61.884.")

IV. CONCLUSION

The evidence submitted by the Companies in this case satisfies their burden under KRS 61.878 (1)(c)1 of showing that the material for which they seek protection is confidential and

proprietary, and if disclosed would provide their competitors with an unfair advantage. The Companies have in fact exceeded this burden by quantifying for the Commission the harm disclosure has caused in a single transaction (approximately \$600,000) and the potential cumulative impact (\$10 million) disclosure could have on the Companies and their customers in one year. The Commission should therefore grant the relief requested by the Companies, which will allow them to purchase fuel and transportation services at the lowest possible price, thus protecting their competitive position in the wholesale energy market, as well as their customers.

Respectfully submitted,



Douglas M. Brooks
Senior Counsel Specialist, Regulatory
LG&E Energy Services Inc.
220 West Main Street
P.O. Box 32030
Louisville, Kentucky 40232
(502) 627-2557
**Counsel for Louisville Gas and Electric Company
and Kentucky Utilities Company**

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing Brief was mailed this the 1st day of February, 2001 to the Honorable Elizabeth E. Blackford, Assistant Attorney General, Office of Rate Intervention, 1024 Capital Center Drive, Frankfort, KY 40601



Douglas M. Brooks

**LOUISVILLE GAS AND ELECTRIC COMPANY
KENTUCKY UTILITIES COMPANY**

CASE NOS. 2000-453 & 2000-454

**Response to Information Requested During the
December 6, 2000 Hearing Before the
Public Service Commission**

Responding Witness: Robert M. Hewett / James N. Hellar

- Q-2. A list of the terms and conditions in each contract for which KU/LG&E seeks confidentiality.
- A-2. The KU and LG&E Petitions for Confidential Treatment of Coal and Coal Transportation Contracts contain the items for which confidentiality has been requested. Shown below is a list of those items:

Quantity of Product to be Purchased
Ending Date of Contract (Defining length of contract)
Price Per Ton
Monthly Discount Values
Individual Barge Discount Value
Base F.O.B. Price Per Ton
Base F.O.B. Price Per MMBTU
BTU Premium/Penalty
SO₂ Penalty
Quality Price Discount (Ash, Moisture, BTU/lb., Sulfur)
Ash Penalty
Site of Barge Deliveries

LOUISVILLE GAS AND ELECTRIC COMPANY
AND
KENTUCKY UTILITIES COMPANY

CASE NOS. 2000-453 & 2000-454

Response to Commission Staff's First Set of Interrogatories
and Requests for Production of Documents

Responding Witness: Gerhard Haimberger/James N. Heller

Q-14. Identify each instance in which either of the Joint Petitioners incurred economic damage as a result of the public availability of its coal supply and coal transportation contracts. For each instance identified, describe how the harm occurred, the extent of the harm (in dollars), and the parties to the transaction.

A-14. As an example, KU Contract F-00755 with AEI Coal Sales, Inc. contains four different coal prices that were negotiated with the coal supplier. Each of the four prices is relevant to a different barge loading point. Because the coal supplier had access to KU's barging contract, and therefore knew the precise barge rate differentials between various origins, the coal supplier bargained from a delivered price standpoint and was able to raise the coal price between \$1.00 and \$1.25 per ton for three of the four loading origins to take advantage of the lower barge rates KU had negotiated in its barging contract. At 480,000 tons per year, the harm to KU and its customers in this example would be \$600,000 dollars per year.

It is not feasible to describe each instance in KU or LG&E's fuel procurement history where similar events have occurred. However, every coal purchase has the same, or similar, elements of price negotiation. If these circumstances applied to all coal purchases of KU and LG&E on an annual basis, the damage could be as much as \$10,000,000 per year. This value is based on new purchases and/or re-negotiation of approximately 70% of annual coal requirements.

Knowledge of Barge Rate Differences Allows Coal Seller to Precisely Increase Coal Price and Still Win Business

River Point East - Kanawha River
(baseline)

Typical Price	Negotiated Price
26.25	26.25

Big Sandy River

Typical Price	Available "Rent" Price	Negotiated Price	Coal Price Increase
26.25	1.82	27.25	1.00

TTI Terminal - Ohio River

Typical Price	Available "Rent" Price	Negotiated Price	Coal Price Increase
26.25	2.32	27.50	1.25

\$3.16 barge rate

\$0.84 barge rate

\$1.34 barge rate

\$29.41 delivered price at Ghent

PA